(17)

No. 96-270

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*,

Petitioners,

v.

GEORGE WINDSOR, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C., IN SUPPORT OF RESPONDENTS

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34 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page:**

Rules:

Miscellaneous:

INTEREST OF *AMICUS CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

As part of its efforts to ensure the proper working of the civil justice system, TLPJ has established a Class Action Abuse Prevention Project dedicated to monitoring, exposing, and preventing abuses of the class action device nationwide. Through this work, TLPJ has become especially concerned about efforts by corporate defendants to use the class action device as a tool for capping their liability in mass tort cases and depriving injured victims of their rights. One means to this end is to create "settlement-only" class actions that include all individuals who have been exposed to a hazardous product -- whether or not they have yet manifested any disease. TLPJ submits this brief to urge the Court to reject this approach and make clear that, at least under the circumstances of this case, due process prohibits the adjudication or release of absent class members' unaccrued future personal injury claims.

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[1] Letters of consent to the filing of this brief have been filed with the Clerk.

STATEMENT

This class action seeks to settle the personal injury claims of millions of individuals who have been exposed to asbestos products manufactured by a consortium of companies known as the Center for Claims Resolution ("CCR"). If approved, the settlement will extinguish the personal injury claims of every individual who has been exposed to asbestos made or supplied by CCR, even though most of those individuals have not yet gotten sick and could not currently seek damages for their future injuries in individual lawsuits. In the Third Circuit's words, "[t]hese 'futures claims' of 'exposure-only' plaintiffs would be extinguished even though they have not yet accrued." *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 617 (3d Cir. 1996).

The inclusion of future claims in the class settlement was the culmination of CCR's efforts to limit its members' liability in asbestos cases. The saga began in 1991, when the Judicial Panel on Multidistrict Litigation transferred all existing federal asbestos personal-injury litigation to the Eastern District of Pennsylvania. Thereafter, CCR approached two members of the plaintiffs' asbestos bar in an attempt to negotiate a settlement of all *future* (rather than pending) asbestos claims against the CCR defendants. *See Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 305 (E.D. Pa. 1994).

CCR achieved its goal on January 15, 1993, when the two attorneys and CCR filed a class action complaint, an answer, and a stipulation of settlement. The class was defined to include "all persons exposed occupationally . . . to asbestos supplied by any CCR defendant, and . . . the spouses and family members of such persons, who had not filed an asbestos related lawsuit against a CCR defendant as of the date the class action was commenced." 83 F.3d at 619 (footnote omitted).

By defining the class to include "all persons exposed occupationally" to asbestos supplied by the CCR defendants, CCR was able to achieve a settlement that not only included individuals who had already gotten sick as a result of asbestos exposure, but also encompassed the future claims of "exposure-only" plaintiffs who had not yet manifested any asbestos-related disease. Moreover, by defining the class to include the "spouses and family members" of future personal injury victims, CCR was also able to settle the claims of individuals who cannot possibly be known and, in some cases, do not yet even exist -- *i.e.*, spouses yet to be married and children yet to be conceived.

Because the exposure-only class members lacked standing to assert claims based on future personal injuries, the class complaint merely alleged that these individuals were entitled to receive medical monitoring and recover damages for their emotional distress and increased risk of cancer. *See* J.A. 4-21 (Class Complaint).[2] These claims were abandoned, however, in exchange for a settlement that purports to settle all present and future claims of class members for asbestos-related personal injury or wrongful death against the CCR members that were not filed before January 15, 1993. In essence, the settlement establishes a complex administrative procedure that would, over a period of years, provide various levels of compensation for class members meeting certain exposure and medical criteria. *See* 83 F.3d at 620-21; 157 F.R.D. at 267-85.[3] Notably, the

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[2] With respect to the presently-injured class members, in contrast, the class complaint sought compensatory and punitive damages related to the class members' asbestos-related personal injuries. *See id.*

[3] For those class members who qualify, the settlement establishes a range of damages that CCR will pay for each disease, and places caps both on the amount that a particular victim may recover and on the number of qualifying claims that may be paid in any given year. 83 F.3d at 620. Claimants found to have "extraordinary" claims can be awarded more than the

claims asserted by the exposure-only plaintiffs -- claims for increased risk of cancer, fear of future injury, and medical monitoring -- do not receive any compensation under the settlement. Instead, these individuals are only eligible for relief when and if they contract certain asbestos-related diseases. *See* 83 F.3d at 620.

Shortly after the proposed settlement was filed, the district court conditionally certified the class under Fed. R. Civ. P. 23(b)(3), which requires that class members be given notice and the right to exclude themselves from the class. Subsequently, the court approved a plan to give notice to the class through a combination of TV and print ads, an "800 number," and union-sponsored publicity. *See* 157 F.R.D. at 314-36. The notice also explained that class members who did not want the relief proposed in the settlement had the right to exclude themselves from the litigation by filing an opt-out form by a certain deadline. All class members who did not opt out by that deadline are bound -- even if they had no current injury and no idea they were ever exposed to asbestos.[4]

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cap allows, but only a limited number of claims can be found to be "extraordinary," and even persons with those claims are barred from seeking or recovering punitive damages. *Id.* In addition, the total amount of compensation available to victims is itself capped. Payment under the settlement is not adjusted for inflation. *Id.*

[4] The settlement provides a limited "back-end opt-out" right that will permit a few class members to pursue their claims in court after their injuries have become manifest. This right, however, is limited to two percent of the total number of mesothelioma and lung cancer claims, one percent of "other cancer" claims, and one-half of one percent of "non-malignant conditions" claims from the previous year. *See* 83 F.3d at 620. Thus, if the settlement is approved, exposure-only plaintiffs who failed to opt out by the original deadline will remain in the class in perpetuity. Moreover, even class members who are eligible for the "back-end opt out" must agree to waive any claim for punitive damages and must comply with numerous procedural restrictions. *See* J.A. 87-90 (Stipulation of Settlement).

The district court ultimately approved the settlement as fair, adequate, and reasonable within the meaning of Fed. Rule Civ. P. 23. *See id.* at 325. The court subsequently enjoined class members from pursuing any claims against CCR outside of the settlement. *See Georgine v. Amchem Products, Inc.*, 878 F. Supp. 716, 723 (E.D. Pa. 1994). Numerous objectors appealed the district court's injunction, arguing, among other things, that the inclusion of future victims' personal injury claims in the class settlement violated the absentee class members' constitutional rights to due process. In particular, the objectors argued that, in a futures class action with virtually no delayed opt-out rights, notice to absent class members cannot meet the requirements of the U.S. Constitution. *See* 83 F.3d at 622.

On appeal, the Third Circuit ultimately did not decide whether the inclusion of future personal injury claims in the class settlement violated due process. *See id.* at 634. Instead, the lower court vacated the settlement on the ground that the class could not meet the various certification requirements of Rule 23. *Id.* at 626. In so holding, however, the court emphasized that the inclusion of future personal injury claims in the class settlement contributed to the class' inability to meet the certification requirements of Rule 23. Thus, for example, regarding the "commonality" and "predominance" requirements of Rules 23(a) and (b)(3), the court noted that the exposure-only plaintiffs "share little in common, either with each other or with the presently injured class members." *Id.* at 626. Similarly, regarding the "adequacy-of-representation" requirement of Rule 23(a)(4), the court held that the "serious intra-class conflicts" between the present claimants and future victims rendered the class representatives incapable of adequately representing the class. *See id.* at 630.[5]

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[5] Concerns relating to the inclusion of future victims in the class

The Third Circuit also emphasized its "serious concerns about the constitutional adequacy of class notice" with respect to the exposure-only class members. *Id.* at 623. Those concerns were rooted in the fact that these class members "may not know that they have been exposed to asbestos within the terms of this class action." *Id.* at 633. The court added that even those class members who manage to hear about the class settlement and realize they fall within the class definition "may lack adequate information to properly evaluate whether to opt out of the settlement." *Id.* at 633 (footnote omitted). Although the court did not decide whether these concerns rendered the class notice constitutionally infirm, it stressed that "this situation raises serious fairness concerns." *Id.* at 634.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners would have this Court believe that this case is in some way similar to the type of garden-variety class action settlements that numerous courts have approved, time and again, since Rule 23 was first restructured to permit opt-out class actions for damages. Thus, they argue that the Third Circuit's decision constitutes a "radical change in long-settled class action practice" that would, among other evils, "make numerous beneficial class action settlements impossible." Brief for Petitioners at 2.

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were also at the core of the Third Circuit's findings that the class did not meet the "typicality" requirement of Rule 23(a)(3) or the "superiority" requirement of Rule 23(b)(3). *See, e.g.*, 83 F.3d at 632 ("[e]ven though the named plaintiffs include a fairly representative mix of futures and injured plaintiffs, the underlying lack of commonality and attendant conflicts necessarily destroy the possibility of typicality."); *id.* at 634 (class action not superior method of adjudication because, among other things, "it is obvious that if this class action were approved, some plaintiffs would be bound despite a complete lack of knowledge of the existence or terms of the class action.")

In reality, however, this is an unprecedented action. It began with the pre-packaged filing on a single day of a class action complaint, answer, *and* stipulation of settlement of a case that both parties admit they never intended to litigate -- and that, in truth, no parties ever *could* litigate. Unlike any other case before or since, it seeks to constrain future asbestos victims to a pre-determined, administrative remedy -- or, in some cases, no remedy at all -- without any averments by the defendants of limited funds and without any recourse to bankruptcy proceedings. It attempts class-wide adjudication of a mass tort -- an area where courts have been traditionally wary of certifying classes because the claims are deeply personal and "vitally affect a significant aspect of the lives of the claimants." *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76, 79 (E.D. Pa. 1970). *See also* Fed. R. Civ. P. 23, Advisory Committee Notes (1966 Amendment) ("[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action"). And it is a settlement class, "the subject of considerable controversy" because of the dangers of abuse and collusion in reaching an agreement before the procedural protections of Rule 23 are in place. *See Plummer v. Chemical Bank*, 668 F.2d 654, 657-58 (2d Cir. 1982).

But the most notorious -- and constitutionally suspect -- aspect of this case is its attempt to extinguish, in one fell swoop, the unaccrued *future* claims of literally millions of individuals who have been occupationally exposed to asbestos -- and may not even know it. In this sense, this case represents the pinnacle of attempts by defendants to use class actions as vehicles for capping their liability in damages cases. On occasion, defendants have tried to attain this goal by seeking to create mandatory, "no-opt-out" classes that strip victims of their right to exclude themselves from class litigation. This approach, however, has met with uneven success, because defendants often have difficulty shoehorning their cases into one

of the mandatory certification "prongs" of Rule 23.[6] Another, more insidious approach is to create "opt-out" damages classes under Rule 23(b)(3) that include both present and *future* victims of a defendant's mass tort. While such actions theoretically grant class members a right to pursue their own individualized litigation, they in fact leave many class members with no meaningful opportunity to exercise this right, trapping them in the class action for perpetuity. In this way, defendants achieve their goal of limiting their future liability for mass torts without having to persuade a court that circumstances warrant certification of a mandatory class under one of the other prongs of Rule 23.

This case represents this trend at its worse. Although other opt-out class action settlements have sought to encompass the "future" personal injury claims of mass tort victims, *see, e.g., Bowling v. Pfizer*, 143 F.R.D. 141 (S.D. Ohio 1992) (heart valves); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1995) (breast implants), the classes in those cases have included only persons who could plainly determine -- at the time of certification -- whether they are or are not class members, *i.e.*, whether they do or do not have heart valves or breast implants.

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[6] Regarding Rule 23(b)(1)(B), *compare In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996) (affirming, over vehement dissent, no-opt-out damages class of future asbestos victims under Fed. R. Civ. P. 23(b)(1)(B)) *with In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984) (rejecting no-opt-out damages class of drug victims under Fed. R. Civ. P. 23(b)(1)(B) for failure to demonstrate limited fund). Regarding Rule 23(b)(2), *compare Brown v. Ticor Title Ins. Co.*, 982 F.2d 383 (9th Cir. 1992) (refusing to afford preclusive effect to no-opt-out class under Fed. R. Civ. P. 23(b)(2) that included both damages claims and injunctive relief), *cert. dism'd as improv. granted sub nom. Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1292 (1994), *with Adams v. Robertson*, 676 So.2d 1265 (1995) (affirming no-opt-out class under Alabama Rule 23(b)(2) that included both damages claims and injunctive relief), *cert. granted*, 117 S. Ct. 37 (1996) (No. 95-1873).

This class goes light years farther by attempting to simultaneously extinguish the unaccrued future claims of millions of individuals who are entirely unaware that they have even been exposed to a hazardous product, let alone that their rights are being extinguished in a class action settlement. If this unique and extraordinary class action is permitted to stand, it will serve as a green light for manufacturers and suppliers of insidiously dangerous products to use Rule 23 as a device for limiting the rights of their "future victims" before those individuals' claims ever accrue. That practice cannot be -- and is not -- constitutional.

We recognize, of course, that the Third Circuit did not ultimately decide whether the Constitution prohibits binding future plaintiffs through a 23(b)(3) opt-out class action. *See* 83 F.3d at 634. Rather, it held that the presence of future claimants contributed to the class' inability to meet the various certification requirements of Rule 23. However, we submit that -- particularly since the Rule 23 safeguards were deliberately drawn in light of due process requirements -- the more natural way to approach the case is to hold that the settlement's attempt to extinguish the rights of "future victims" whose personal injury claims had not yet accrued fails to pass muster under the U.S. Constitution.

This settlement violates the due process rights of future victims in two distinct ways. First, the settlement cannot be reconciled with the class members' constitutionally mandated rights to receive meaningful notice of a class settlement and a full and fair opportunity to exclude themselves from the class. These rights are embodied in Rule 23(c)(2), which requires that absent class members be given notice and the right to opt out of damages classes certified under Rule 23(b)(3). This provision was created in 1966, when Rule 23 was amended to permit, for the first time, absent class members to be bound to a judgment in a common-question damages class action without their

affirmative consent. The history of this provision reveals that it was expressly designed to protect the constitutional rights of absent class members to control their own individual litigation. This Court has since affirmed that the mandatory notice and opt-out rights embodied in Rule 23(c)(2) are minimal safeguards mandated by due process.

These minimal safeguards are rendered impotent in this case due to the settlement's attempt to extinguish the unaccrued personal injury claims of exposure-only class members. First, many of the future victims in the class had no way of knowing they were included in the settlement, either because they were unaware of their asbestos exposure or had no idea that their ability to sue in the future could be limited now, when they have no personal injury. Future spouses and children, of course, could not possible receive proper notice, since the former cannot identify themselves and the latter do not exist. Even those class members who were aware of their inclusion in the class, moreover, lacked any meaningful way to evaluate the settlement's terms, since they had no way of knowing what asbestos-related disease they might ultimately contract and how much that disease would be "worth" under the terms of the settlement (which is not adjusted for inflation). As a result, the notice and opt-out rights provided in this case were essentially meaningless -- a result that cannot be reconciled with due process.

Second, the proposed settlement violates the future victims' constitutional right to adequacy of representation, which is set forth in Rule 23(a)(4). Like the notice and opt-out rights applicable to Rule 23(b)(3) damages classes, the adequacy-of-representation requirement was carefully drawn to satisfy minimal requirements of due process in class actions. Since Rule 23 was amended to its present form in 1966, this Court has repeatedly reaffirmed that adequacy of representation is a core element of due process that must be satisfied in every

class action.

This requirement was violated in this case because the class representatives lacked authority to release the future personal injury claims of exposure-only class members. It is axiomatic that class representatives' authority is limited to the claims they possess in common with other members of the class. This limitation is designed to ensure that the class representatives, through the driving imperative of self interest, will achieve the best possible result for the class. No such imperative exists in a case where -- as here -- the settlement seeks to extinguish future personal injury claims that, by their very nature, are unrelated in critical respects to those claims held by the class representatives. As the Third Circuit recognized, the unaccrued future personal injury claims encompassed in the settlement will vary radically from class member to class member, especially with respect to the nature of their damages. Given these disparities, the class was incapable of "generat[ing] a typical representative" (83 F.3d at 632), let alone one able to adequately represent the full range of interests encompassed in the class -- either for litigation *or* settlement purposes. Thus, the inclusion of future personal injury claims in the settlement renders this class action unconstitutional, regardless of how one interprets the various protections of Rule 23.

ARGUMENT

THE INCLUSION OF FUTURE PERSONAL INJURY CLAIMS IN THE CLASS RENDERS THE SETTLEMENT UNCONSTITUTIONAL.

As petitioners have framed this case, the key question is whether the Third Circuit erred in holding that "each of [Rule

23's] requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated." 83 F.3d at 626. Resolution of this question, however, is ultimately unnecessary, since the inclusion of future personal injury claims in this class means that the case could not constitutionally be certified for settlement *or* litigation purposes. As is explained in further detail below, both the mandatory notice and opt-out provisions of Rule 23(c)(2) and the right to adequacy of representation embodied in Rule 23(a)(4) were "carefully drawn" to protect the minimal due process rights of absent class members in damages classes certified under Rule 23(b)(3). *See* Charles A. Wright, *et al.*, 7B *Federal Practice and Procedure* ("*Federal Practice*") § 1789, at 251 (1986 & Supp. 1996). Neither of these constitutionally mandated safeguards serves its purpose in a case where -- as here -- a class settlement attempts to extinguish simultaneously a vast array of present and future personal injury claims on behalf of a widely disparate class of individuals, many of whom have no idea they were ever exposed to the defendant's product and have no way of determining what related disease -- if any -- they will ultimately contract. Because these core procedural safeguards are rendered largely meaningless in the context of this "future victims" settlement, this class violates the due process rights of the absent class members -- and *a fortiori* violates the various certification criteria of Rule 23.

I. The Class Settlement Violates the Future Victims' Constitutionally-Mandated Notice and Opt-Out Rights.

The constitutional underpinnings of the rights to notice and opt-out embodied in Rule 23(b)(3) are best revealed by the history of the modern class action rule. Prior to 1966, when Rule 23 was amended to its present form, the federal rules did not permit *any* class actions seeking damages at law to bind absent class members without their express consent. At the

time, Rule 23 limited the binding effect of "common question" damages classes to the parties and class members who affirmatively chose to intervene in the action -- in other words, a type of "opt-*in*" procedure. *See* 3B James W. Moore & John E. Kennedy, *Moore's Federal Practice* ("*Moore's*") ¶ 23.02-1, at 23-73 (2d ed. 1993). This restriction reflected the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).[7]

The 1966 amendments to Rule 23 expanded the reach of class actions. Most notably, new Rule 23(b)(3) permitted, for the first time, absent class members to be bound to a judgment in a common-question damages class action without their affirmative consent. Recognizing the dangers this posed, the Rules Advisory Committee included a number of procedural protections in the new Rule to safeguard the due process interests of absent class members. Foremost among these protections were the mandatory notice and opt-out provisions of

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[7] Original Rule 23 did permit mandatory class actions in two other types of cases -- known as "true" and "hybrid" -- where the class members share an indivisible, unified interest in a common result. *See* 3B *Moore's* ¶ 23.02-1, at 23-73. "True" classes were defined as involving rights that were "joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it." Fed. R. Civ. P. 23(a)(1) (1938). "Hybrid" classes involved rights that were "several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action." Fed. R. Civ. P. 23(a)(2) (1938). In 1966, these classes were transformed into the mandatory classes permitted under Fed. R. Civ. P. 23(b)(1) and (2), which apply in cases where a group of individuals seek *in rem* recoveries against a common fund (under prong (b)(1)) or seek relief that is predominantly injunctive in nature (under prong (b)(2)). Neither of these circumstances applies in this case.

new Rule 23(c)(2), which requires that absent class members be given notice and the opportunity to exclude themselves from classes certified under Rule 23(b)(3). At the time, the Committee noted that, in damages cases:

> the interests of individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. *Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.*

Notes of Rules Advisory Committee to 1966 Amendments to Rule 23, 39 F.R.D. 69, 104-05 (1966) (emphasis added). The Committee Notes further reflect that the mandatory notice and opt-out provisions were necessary "to fulfill requirements of due process to which the class action procedure is of course subject." *Id.* at 107 (citing, *inter alia*, *Hansberry v. Lee*, 311 U.S. 32 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

Even with the protection of the new notice and opt-out provisions, many commentators expressed strong reservations about the constitutionality of the new Rule 23(b)(3) damages class. For example, Professor Wright wrote:

> In the situation which (b)(3) covers, there is a strong feeling that the person who wants to go it alone, and to bring his individual action with his own lawyer, should be permitted to do so. . . . Even with this protection [of the right to opt-out], (b)(3) is a novel and controversial proposition . . .

Charles A. Wright, *Proposed Changes in Federal Civil,*

Criminal and Appellate Procedure, 35 F.R.D. 317, 338 (1964).

Similarly, Judge Frankel called the sweep of the (b)(3) class "among the more debatable" provisions of Rule 23, and compared the opt-out procedure to the Book-of-the-Month Club. *See* Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44 (1967). He indicated his preference for an affirmative opt-in procedure, so that silence would not constitute consent to inclusion. *See* Marvin E. Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 Antitrust L.J. 295, 299 (1966). In the end, he urged that Rule 23 not "be pressed to the limits of its logic or to the literal dimensions that its language might possibly suggest." *Id.* at 297.

Notwithstanding these reservations, the constitutionality of Rule 23(b)(3) classes was affirmed by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-13 & n.3 (1985). *Shutts* made clear, however, that the notice and opt-out requirements embodied in the Rule are not merely procedural niceties, but rather are indispensable requirements of due process. Thus, this Court stated that a court wishing "to bind an absent plaintiff concerning a claim for money damages or similar relief at law . . . must provide minimal procedural due process protection." 472 U.S. at 810. Such minimal protection must include "notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel . . . [and] an opportunity [for the absent plaintiff] to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.*

By requiring that courts provide absent class members the right to exclude themselves from actions involving claims for money damages, *Shutts* recognized the constitutionally-protected interest of absent plaintiffs to control their own inherently

particularized damages claims. Thus, while the procedural device of the class action has made some inroads on "our deep-rooted historic tradition that everyone should have his own day in court," *Martin v. Wilks*, 490 U.S. 755, 762 (1989), there can be no question that the notice and opt-out rights embodied in Rule 23(c)(2) are indispensable requirements of due process in class actions seeking damages at law. *Shutts*, 472 U.S. at 810.

Against this backdrop, it is readily apparent that the class action at issue in this case fails to withstand constitutional muster. First and foremost, many -- if not most -- of the future victims in the class had no way of knowing they were included in the settlement. As the Third Circuit recognized, exposure-only class members may be entirely in the dark about whether they were ever occupationally exposed to asbestos and, if so, to what extent. *See* 83 F.3d at 633-34. Yet even individuals who have had only "slight and incidental exposure" to asbestos can develop crippling diseases such as mesothelioma, which is always fatal, "generally within two years of diagnosis." *Id.* at 633.[8] These problems are magnified with respect to exposure-only class members' future spouses and other family members, who may have had no relationship with the class members -- and may not even have existed -- during the notice and opt-out period. Even currently-existing family members might have had no way of knowing during the notice period that their spouse or parent was ever occupationally exposed to asbestos. For these class members, the notice and opt-out rights afforded by the settlement are essentially meaningless.[9]

In these respects, this case is far more troubling than other class action settlements that have sought to affect claims for future personal injuries. For example, class members in cases involving medical devices implanted through surgery presumably have little difficulty identifying themselves as falling within the class definition. *See, e.g., Bowling v. Pfizer*, 143 F.R.D. 141 (S.D. Ohio 1992) (heart valves); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1995) (breast implants). Although these cases may present other problems, the future victims included in those settlements at least had a fair chance of knowing that their rights were at risk. What makes the present case so uniquely unfair is that it includes thousands, if not millions, of individuals who had no conceivable way of identifying themselves as members of the class. *See generally* Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.* ("*Feasting*"), 80 Cornell L. Rev. 1045, 1086 (1995) ("*Georgine* . . . is atypical because it involves a class composed largely of persons who could not be identified by the parties, who had not yet manifested injury at the time the action was brought, and who might not have known then or now that they had been exposed to the hazardous product.")[10]

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[8] As the Third Circuit explained, mesothelioma "has been known to occur in persons who lived with an asbestos-exposed parent, or in household members who washed the clothes of people who worked with asbestos. . . . The unpredictability of mesothelioma is further exacerbated by the long latency period between exposure to asbestos and the onset of the disease, typically between fifteen to forty years. As a result, persons contracting the disease today may have little or no knowledge or memory of being exposed." 83 F.3d at 633.

[9] These problems were massively exacerbated by the form of notice provided to the class. At least when individual notice is given, class members can be informed that the class action includes them. In this case, however, notice principally took place through television, print ads, and other forms of publicity to the public at large.

[10] In *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994), the Second Circuit rejected a collateral attack on a mass tort class action settlement that include the future personal injury claims of individuals who had been exposed to "Agent Orange," but had not yet contracted any related disease. Although we believe

Equally important, even those individuals who *were* able to identify themselves as class members had no meaningful way to determine whether to object to the settlement's terms or to opt out of the class. As the Third Circuit found, the exposure-only class members' futures are "completely uncertain" insofar as they have no way of knowing whether they will eventually get sick and, if they do, which of the wide variety of asbestos-related diseases they will contract. *See* 83 F.3d at 632. These individuals also had no way of knowing whether their unknowable, future disease would be compensable under the settlement, and, if it was, how much that disease would be "worth," particularly in light of the fact that the settlement does

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that *Ivy* was wrongly decided, the case is also distinguishable from *Georgine* for several reasons. First, the Second Circuit emphasized that, unlike plaintiffs in asbestos litigation, the *Agent Orange* plaintiffs had only "speculative" or "dim prospects of success" and that the "crucial issue of 'general causation' . . . remains unsettled." *Id.* at 1436-37. In addition, the Second Circuit stressed that there was no conflict between the present and future claimants in the class because both groups were eligible for compensation from the same fund, presumably on the same terms. *Id.* at 1429, 1435-36. This is strikingly different from this case, where the interests of the present and future claimants are in direct conflict. *See* 83 F.3d at 630-31. Third, and perhaps most important, the Second Circuit made clear that class certification was only appropriate in *Agent Orange* because of the unique presence of one, overriding legal issue -- the "military contractor defense" -- common to the entire class. Thus, the court stressed "the cardinal fact" that Agent Orange was "'sold by private manufacturers under contract for the government for use in a war.'" *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 166 (2d Cir. 1987) (quoting *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858, 860 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984)). The court further stated that, "[w]ere this an action by civilians based on exposure to dioxin in the course of civilian affairs, we believe certification would have been in error." *Id.* Even the district court in *Agent Orange* acknowledged that, "*[u]nlike litigations such as those involving DES, Dalkon Shield and asbestos*, the trial is likely to emphasize critical common defenses" -- particularly the military contractor defense -- "applicable to the plaintiffs' class as a whole." *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 723 (E.D.N.Y. 1983) (emphasis added).

not compensate for inflation. In short, because they cannot predict their own future, even class members who could identify themselves as such had no way to make an intelligent decision whether to opt out of the class or accept the settlement and waive their constitutional rights, including the right to a jury trial. *Cf. Brady v. United States*, 397 U.S. 742, 748 (1970) (waiver of constitutional rights "must be knowing, intelligent [and] done with sufficient awareness of the relevant circumstances and likely consequences.")

In this respect, too, this case is far more extreme than other class action settlements involving future personal injuries. In the heart-valve settlement, for example, class members will at least be afforded a second, unlimited "back-end" right to opt out of the class settlement and pursue their own relief when and if their heart valves fracture in the future. *See Bowling*, 143 F.R.D. at 157. In this case, in contrast, only a tiny percentage of the class will be permitted to opt-out of this case at the "back-end," and they will still be bound in constitutionally impermissible ways. *See* n.4, *supra*. The vast majority of the exposure-only class members will have no further opportunities to exclude themselves from the class no matter what injuries they incur in the future and regardless of the effect of inflation on the real value of their recovery under the settlement.

For these reasons, this case cannot be reconciled with the constitutionally-mandated notice and opt-out rights embodied in Rule 23. These rights were designed to give absent class members the ability to protect their own interests by objecting to a proposed settlement or by opting out of the case to pursue individual litigation. This role, however, cannot be fulfilled in a case where -- as here -- most class members were not given any meaningful notice of their inclusion in the settlement or any means of evaluating its terms as applied to them. Thus, this core procedural safeguard -- firmly rooted in the U.S. Constitution -- is simply lacking in this case.

II. The Class Settlement Violates the Future Victims' Constitutionally-Mandated Rights to Adequate Representation.

The second constitutional infirmity in the proposed settlement is that it deprives the future victims of their due process right to adequate representation. To begin with, there is no question that Rule 23(a)(4)'s adequacy-of-representation requirement is a minimal requirement of due process. As Justice Ginsberg recently wrote in her concurrence in *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873, 875 (1996), "adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members." *See also Shutts*, 472 U.S. at 812; Herbert Newberg & Alba Conte, 1 *Newberg on Class Actions* (*"Newberg"*) § 1.13 (3d ed. 1992). With regard to the class representatives, this safeguard requires, at a minimum, that "the interests of the named plaintiffs must be sufficiently aligned with those of the absentees." 83 F.3d at 630 (citing *In re General Motors Corp. Pick-Up Trucks Fuel Tank Prods. Liab. Litigation*, 55 F.3d 768, 800 (3d Cir.), *cert. denied sub nom., General Motors Corp. v. French*, 116 S. Ct. 88 (1995)).[11]

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[11] The adequacy-of-representation requirement also applies to class counsel, "who must be qualified and must serve the interests of the *entire* class." 83 F.3d at 630 (emphasis in original). *See also Matsushita*, 116 S. Ct. at 888 n.5 (Ginsberg, J., concurring); *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982). In the proceedings below, the objectors to the class settlement "forcefully argued that class counsel cannot adequately represent the class because of a conflict of interest" -- namely, that counsel "brought a collusive action on behalf of the CCR defendants after having been paid over $200 million to settle their inventory of previously filed cases." 83 F.3d at 630. However, the Third Circuit did not ultimately decide whether class counsel in fact suffered from a disqualifying conflict of interest (*see id.*), and we do not address that issue here.

As with the mandatory notice and opt-out provisions of Rule 23(c)(2), the drafters of the modern class action rule regarded the adequacy-of-representation requirement as an essential safeguard of the due process rights of absent class members. *See* 7A *Federal Practice* § 1765, at 263. This Court has since repeatedly affirmed that adequacy of representation is a basic element of due process in opt-out damages class actions brought under Rule 23(b)(3). *E.g., Shutts*, 472 U.S. at 812 ("the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.") (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)). *See also Matsushita*, 116 S. Ct. at 875 (Ginsburg, J., concurring).

Rule 23 incorporates this constitutional standard by requiring a showing of adequacy of representation in every class action. *See* Fed. R. Civ. P. 23(a)(4). In this case, the Third Circuit held that the class failed this requirement due to the inherent, irreconcilable "intra-class" conflicts between the presently injured and future plaintiffs -- in particular, the fact that "the former have an interest in preserving as large a fund as possible while the latter seek to maximize front-end benefits." 83 F.3d at 618; *see also id.* at 630-31. These conflicts, in the court's view, rendered the class representatives incapable of adequately representing the class, since "the named plaintiffs' interests cannot align with those of absent class members if the interests of different class members are not themselves in alignment." *Id.* at 630.[12]

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[12] The lower court added that the conflict between the future victims and the presently injured class members was not cured by the fact that the named plaintiffs included representatives from both categories due to the "lack of any structural protections in the case." *Id.* at 631. One possible "structural protection" that could mitigate this conflict of interest is to create separate subgroups of presently-injured and exposure-only class members, each represented by their own attorneys. No such protection existed here, since the

We agree that, in this case, the intra-class conflicts between present claimants and future victims prevented the adequacy-of-representation requirement from being met. However, there is another, equally compelling reason why the class representatives failed to adequately represent the class: the release of the absent class members' future claims violates the "most fundamental principles underlying class actions, [which] limit the powers of the class representatives to the claims they possess in common with other members of the class." Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 694 (1994). This restriction is rooted in the basic rationale underlying the adequacy-of-representation requirement: "the court must be satisfied that the class representative, by litigating his or her personal claim, will also necessarily be litigating common claims that are shared by the class." 1 *Newberg* § 1.13, at 1-36. As one commentator put it,

> The basic philosophy of class actions has remained unchanged through the centuries. Self-interest, the motivating force that sparks the adversary system, also sustains the doctrine of class actions. We may trust man to help his fellow man if by doing so [he] helps himself. Building on that simple premise, the [class action] device provides for the use of man's natural instinct to act in his own best interest in order to achieve justice and procedural efficiency in mass litigation.

Homburger, *State Class Actions and the Federal Rule*, 71 Columbia L. Rev. 609, 610 (1971).

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entire class was represented, *en masse*, by the same set of class representatives and the same counsel.

By restricting class representatives' authority to claims that they hold in common with the entire class, the adequacy-of-representation requirement ensures that the class representatives -- through the "motivating force" of self-interest -- will achieve the best result possible for the class. Thus, "[w]hen the class representative's claims are the same as or similar to those of the class members, the court may rely in part on the representative's self-interest in prosecuting those claims to protect the interests of the class members." 3 *Newberg* § 3.01, at 3-5.[13] Conversely, "[t]o the extent the plaintiff or class members also have unique individual claims, the plaintiff cannot adequately represent the class on uncommon claims, nor will the adjudication of common issues affect or be binding on the individual uncommon claims possessed by the plaintiff or class members." *Id.* § 1.13, at 1-37 (footnotes omitted).

The Second Circuit followed these principles in *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), which reversed a district court's approval of a class action settlement releasing claims that did not arise out of the facts pled in the complaint. There, the district court had certified a class of purchasers of potato futures contracts who liquidated the contracts between April 13, 1976, and May 7, 1976. The class members alleged that the wrongful conduct of the defendants had depressed the price of those contracts. Class counsel and the defendant agreed to a settlement that released both the claims alleged in the complaint *and* any claims

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[13] This observation was made in connection with the "typicality" requirement of Rule 23(a)(3), as opposed to the adequacy-of-representation requirement of Rule 23(a)(4). As many commentators have noted, however, the two tests are closely related, and courts frequently discuss both of them together in their class rulings. 3 *Newberg* § 3.13, at 3-73 to 3-74 & n.190. *See also General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting that the commonality and typicality requirements of Rule 23(a) "tend to merge with the adequacy-of-representation requirement").

regarding futures contracts that were liquidated *after* May 7, 1976. Over objections, the district court approved the fairness of the settlement. *See id.* at 15.

The Second Circuit, per Judge Friendly, reversed, holding that the representative plaintiffs were empowered to represent the class "solely with respect to the contracts in which all members of the class had a common interest: contracts liquidated between April 13 and May 7." Judge Friendly added that, "if a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either." *Id.* at 17-18. Thus, the Second Circuit held that the authority of the representative plaintiffs under Rule 23 to release claims on behalf of the class is limited by the scope of the class complaint, which describes the claims all class members have in common. *Id.* at 18-19. *See also International Union of Electronic, Electrical, Salaried, Mach., and Furniture Workers, AFL-CIO v. Unisys*, 155 F.R.D. 41, 48 (E.D.N.Y. 1994) ("*National Super Spuds* thus stands for the proposition that a federal district court may not approve a class-action settlement that seeks to release claims that are inadequately represented by the named plaintiffs"); 7B *Federal Practice* § 1797.1, at 41-42 (quoting *National Super Spuds* with approval and noting that, "[i]n evaluating the fairness and reasonableness of any proposed settlement, the court should make certain . . . that the agreement does not impermissibly waive future claims"); J. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Columbia L. Rev. 1343, 1435 (1995) ("Judge Friendly's view in *National Super Spuds* that an atypical plaintiff cannot meet the 'adequacy of representation' standard in Rule 23(a) rests on a sound perception of the conflicts of interest that arise under any contrary rule.")[14]

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[14] *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873

The proposed settlement in this case violates these basic principles by releasing claims that the class representatives do not hold in common with the rest of the class. Although the unaccrued future personal injury claims of the exposure-only class representatives and the unnamed class members they purport to represent share some common "liability facts" with respect to the CCR defendants -- *e.g.*, the defendants' production of, and failure to warn about, asbestos products -- the vast majority of the facts relating to class members' damages vary radically and depend on proof of events that *have not yet occurred*. As the Third Circuit found in connection with its holding that the class did not meet the "typicality" requirement of Rule 23(a)(3),

> the course of each plaintiff's future is completely uncertain. . . [S]ome plaintiffs may ultimately contract mesothelioma, some may get asbestosis, some will suffer less serious diseases, and some will incur little or no physical impairments. Given these uncertainties, which will ultimately turn into vastly different outcomes, the futures plaintiffs share too little in common to generate a typical representative.

(1996), is not to the contrary. There, this Court reversed a decision of the Ninth Circuit refusing to recognize the preclusive effect of a state court class action settlement that released federal claims brought under the Securities Exchange Act of 1934 that the class representatives held in common with the rest of the class and which, under the Exchange Act as construed by the Court, could be released by a state court. *See id.* at 881-82. In so doing, the Court merely held that the Ninth Circuit erred in refusing to afford full faith and credit to the state court judgment, and did not reach the question of whether the release of federal claims that could not have been pled in the state court proceeding violated due process. In a concurring opinion, Justice Ginsburg stressed that the Court's opinion did not decide whether the class representatives' release of unpled claims violated the absent class members' due process rights, and warned that the issue of adequacy of representation remained open on remand. *Id.* at 885.

> It is simply impossible to say that the legal theories of named plaintiffs are not in conflict with those of the absentees, . . or that the named plaintiffs have incentives that align with those of absent class members.

83 F.3d at 632 (citations omitted).[15] Given this radical disparity among the future personal injury claims held by the exposure-only class members, the class representatives in this case cannot adequately represent the broad and varying interests of the future victims encompassed by the class settlement with respect to those claims -- either for litigation *or* settlement purposes.

Petitioners attempt to sidestep this irremediable defect in the class by arguing that, in the settlement-class context, it is unnecessary to establish that the interests of the named plaintiffs are sufficiently aligned with those of the class to satisfy the adequacy-of-representation requirement. Rather, they claim that "a court's determination that the terms of the settlement are fair presumptively establishes that the class received adequate representation." Brief for Petitioners at 46. Thus, in petitioners' view, it is irrelevant that the class itself is riddled with conflicts, and that the class representatives are not qualified to represent the interests of future victims whose claims necessarily differ from their own. Rather, in their view, the sole question is whether the settlement itself is fair. *See id.*

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[15] Similarly, in connection with its holding that the class failed to meet the "commonality" and "predominance" requirements of Rules 23(a)(2) and (b)(3), the Third Circuit stated that the exposure-only plaintiffs "especially share little in common, either with each other or with the presently injured class members." 83 F.3d at 626. The court elaborated that, for these plaintiffs, "[i]t is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories." *Id.*

This argument hinges on an unrealistic belief that courts are able to adequately police the fairness of all class action settlements. To be sure, under Rule 23(e), no class settlement may be finalized without court approval. As with the other safeguards of Rule 23, this provision was designed to protect the rights of absentee class members from unfair compromise of their rights. *See generally* 7B *Federal Practice* § 1797, at 341-43. *See also Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982) (under Rule 23(e), the court "sit[s] as a guardian for class members who have not received notice or who lack intellectual or financial resources to press objections"), *cert. denied*, 464 U.S. 818 (1983).

It is well understood, however, that courts face serious constraints in their ability to curb abuse by reviewing class action settlements. As the Fifth Circuit cautioned in *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1169 (5th Cir), *cert. denied*, 439 U.S. 1115 (1978), "[l]acking a fully developed evidentiary record, both the trial court and the appellate court [are] incapable of making the independent assessment of the facts and law required in the adjudicatory context." *Id.* at 1169. This absence of a full evidentiary record is due to the lack of any true adversarialness in the context of a class action settlement: "when a class settlement is presented to a court for approval, there may be no 'opposing party.' The settling parties are aligned, and there may be no objector represented at the fairness hearing." *Feasting*, 80 Cornell L. Rev. at 1126. Even when an objector does appear to oppose a settlement,

> this does not transform a fairness proceeding into an ordinary adversary proceeding. Fairness hearings are not supposed to resemble full blown trials, and they do not. Objectors are rarely allowed to conduct extensive discovery on the compromises

> made by the settling parties in their negotiations. Even when the court is persuaded to allow discovery into the negotiation process to expose collusion or other evidence of unfairness, it is highly unlikely to order the depositions of class counsel or defendants' lawyers. Thus, objectors are routinely denied the best evidence by which to establish their position.

Id. at 1126-27 (footnotes omitted). Even in this case, where numerous objectors were represented by counsel throughout the fairness hearing and were granted some discovery, they were denied permission to depose class counsel to obtain information regarding negotiation of the class settlement.

The information problems inherent in evaluating class action settlements, moreover, are massively exacerbated in the context of a "future victims" settlement, where there is often no one available to advocate the rights of the absentees. Even if someone does appear to speak for the future victims, it is impossible to fully evaluate the fairness of the settlement with respect to their claims, since they rest on facts that do not yet exist and legal theories that may have yet to be developed. Finally, even the most diligent court, applying the most rigorous scrutiny possible to a proposed class action settlement, would have no way of knowing how much "fairer" the settlement would have been if the class had been represented by plaintiffs who actually held claims in common with the absentees. *See In re Asbestos Litig.*, 90 F.3d at 1009 n.42 ("No one can tell whether a compromise found to be 'fair' might not have been 'fairer' had the negotiating [attorney] . . . been animated by undivided loyalty to the cause of the class.") (Smith, J., dissenting) (internal quotation omitted).

For all these reasons, petitioners' attempt to avoid the adequacy-of-representation inquiry in this case should be rejected. No matter how "fair" this settlement may have

appeared to the district court in this case, the fact remains that the class representatives lacked any authority to release the unaccrued personal injury claims of the exposure-only class members. Any other result would fly in the face of due process, which forbids absent class members from being bound by a class judgment in which they were represented by individuals "whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). Thus, the settlement in this case violates the constitutional rights of the absent class members and should not be permitted to stand.

CONCLUSION

For these reasons, we urge this Court to affirm the decision of the Third Circuit Court of Appeals.

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